Supreme Court, U.S.
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No. 95-

IN THE

Supreme Court of the United States

October Term, 1995

ARNOLD D. BERKELEY,

Petitioner,

v.

HOME INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Where a district court, acting under F.R.Civ.P. 12 (b)(6) dismissed a part of a case on the ground that it stated no claim and the court of appeals affirmed the "dismissal" on a theory different than that which furnished the basis of the district court's holding,

1. May the appellate court find the factual basis required by its new theory without first giving the plaintiff an opportunity to demonstrate that there is a genuine issue of material fact which for the first time has become material?

2. May the appellate court disregard this Court's holding in *Fountain v. Filson,* 336 U.S. 681 (1949), in which this very same court of appeals had already been "admonished"*/ by this Court for similar disregard of this same procedural right?

II. Whether a federal court of appeals, in reviewing holdings concerning elements of damages before the district court on a motion for summary judgment, may apply the "clear error" standard utilized for review of findings of fact made pursuant to a trial on the merits rather than the "de novo" standard applicable to review of holdings on issues of law and grants of summary judgment?

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*/ *Ramirez de Arellano v. Weinberger,* 745 F.2d 1500, 1537-38 (D.C.Cir. en banc 1984)

PARTIES TO THE PROCEEDING

There are no parties to this case other than those appearing in the caption.

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II. The court below, in reviewing holdings on certain elements of damage before the district court on a motion for summary judgment, violated settled principles when it applied the "clear error" standard utilized for review of findings of fact after a trial, rather than the "de novo" standard applicable to review of holdings on issues of law and grants of summary judgment 22

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

This petition seeks review of the opinion issued by the United States Court of Appeals for the District of Columbia Circuit on November 3, 1995 (App.1-21) which appears at 59 F. 3d 988, which affirmed in part and reversed in part the Orders and Judgment of the District Court dated January 26,

1994, March 8, 1994 and June 15, 1994 (App 23, 30, 32). A timely petition for rehearing with a suggestion of rehearing en banc was filed. It was denied on December 21, 1995. (App.22).

STATEMENT OF JURISDICTION

In seeking review of the above referenced decision of the United States Court of Appeals for the District of Columbia Circuit and its denial of his Petition for Rehearing, petitioner invokes certiorari jurisdiction conferred on this Court by 28 U.S.C. §1254 (1).

STATUTES INVOLVED

Rule 56 of the Federal Rules of Civil Procedure

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a sum mary judgment in the party's favor upon all or any part thereof.

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(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment,

interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

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(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is a competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

STATEMENT OF CASE

Petitioner, Arnold D. Berkeley (Berkeley), is an attorney (now retired) who practiced law in the District of Columbia for many years. At the relevant times, he had professional liability insurance with Home Insurance Company (Home). Berkeley sued Home in the United States District Court for the District of Columbia to recover on his professional liability insurance policy. Home had denied

coverage and had thus refused to pay Berkeley's costs of defense of a claim against him and to indemnify him for the judgment against him.

Berkeley represented his then client Arizona Electric Power Cooperative, Inc. (AEPCO), in a law suit on a contingent fee basis. (App.3) That suit was settled, and AEPCO received various in-kind benefits.[1] In May 1991, as provided in the parties' Contingent Fee Agreement (CFA) Berkeley filed an arbitration claim so that the benefits could be valued.(App. 3).

On March 9, 1992, AEPCO filed a counterclaim against Berkeley in the arbitration proceeding based on certain alleged ethical improprieties. (App. 4). Berkeley promptly tendered the counterclaim to Home and asked it to defend him. (App. 4) Home refused. (Id.) It contended that AEPCO was seeking a return of fees previously paid and under the definition of damages in the policy Home was excused from representing Berkeley in a dispute over the return of legal fees. (Id.)

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[1] At the time of the settlement, AEPCO forecast its value at $120-240 million over ten years. Under the Contingent Fee Agreement, Berkeley was entitled to his contingent fee up-front as a percentage of the total present value of the benefits to be received by AEPCO. However, Berkeley gave up the right to receive almost $20 million immediately and agreed to receive the contingency payments as AEPCO received the benefits of the settlement. Thus, he ran the risk that AEPCO might never receive any benefit or might receive less benefit than it had forecast. Eleven years later he was awarded less than one-half that amount.

On September 22, 1992, the arbitrators awarded Berkeley $9.22 million in contingent fees. (App.4).[2] In a separate order on the counterclaim, the panel found that Berkeley had committed three improprieties and ordered him to remit to AEPCO from the fees awarded an amount equal to fifteen (15) percent of the award ($1.383 million). (Id.)[3]

In August 1991, Berkeley retained the law firm of Steptoe & Johnson (Steptoe) to represent him in the arbitration proceeding. The fee agreement called for Steptoe to represent him at 60 percent of its normal hourly rates, with a fee cap of $500,000, and for Steptoe to receive a contingent fee from any recovery. (Docket Entry 5, Exh.3)[4] After Home

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[2] AEPCO challenged the panel's award in an action in the U.S. District Court in Arizona. This challenge was rejected by the District Court. (App. 5). The Ninth Circuit affirmed, 59 F.3rd. 588.

[3] The improprieties found were: (1) his employment of AEPCO's former general manager as a consultant; (2) his filing of a fee claim against AEPCO without first consulting AEPCO; and (3) his representation of the City of Willcox in a law suit AEPCO brought against Willcox. (During the entire period that Berkeley represented AEPCO, he had also represented Willcox in those matters. After he was fired by AEPCO, he continued to represent Willcox at its request. The AEPCO suit against Willcox was brought after he was fired by AEPCO.) The panel described his conduct relative to these acts as being "below the level of propriety expected of a [senior] member of the Bar." (App.42).

AEPCO also filed a complaint against Berkeley with the Bar Counsel of the District of Columbia Bar citing the arbitrators' order. Bar Counsel held that two of the "improprieties" were not violations of the Rules of professional Conduct. The only finding of the arbitrators which Bar Counsel confirmed was the conflict of interest finding; he issued a Confidential Informal Admonition to Berkeley which is the most lenient sanction Bar Counsel is authorized to impose. (App. 45-52)

[4] References to the Docket Entries in the district court shall hereafter be designated (D.E._____).

denied coverage, Berkeley and Steptoe agreed that Steptoe would also represent Berkeley in the counterclaim at the 60 percent rate, the fee cap would be raised to $575,000, and the contingent fee formula would apply to the entire amount. (App.4; D.E 50, Exh.4,¶5)[5]

Berkeley sued Home in the U.S. District Court for the District of Columbia seeking reimbursement for the legal fees and costs he incurred in defending against the counterclaim and indemnification of the counterclaim award. (App. 5). Berkeley moved for summary judgment on liability under Fed. R. Civ. P. 56(c) on the ground that Home had wrongfully failed to defend him in the arbitration action and the resulting appeals and had wrongfully failed to indemnify him for the judgment against him. Home cross-moved to dismiss under Rule 12(b)(6) for failure to state a claim, but it did not move for summary judgment. The trial court granted Home's motion with respect to indemnity, ruling that, as a matter of law, "impropriety of a lawyer is or should be recognized as 'dishonesty' within the meaning of the exclusion provision" of the insurance policy. (App.27).[6] The

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[5] Berkeley incurred approximately $1.05 million of legal fees, expert witness fees, and other costs after the counterclaim was filed. (D.E.50,Exh. 2) Further, because of Home's refusal to defend, Berkeley owed Steptoe a higher contingent fee when he collected the arbitration award from AEPCO than he would have otherwise.

[6] The exclusion (App. 25) provides that the policy does not apply:

> (a) to any judgment or final adjudication based upon or arising out of any dishonest, deliberately fraudulent, criminal, maliciously or deliberately wrongful acts or omissions committed by the Insured. However, notwithstanding the foregoing, the Company will provide a defense for any such claims without any liability on the part of the Company to pay such sums as the Insured shall become legally obligated to pay as damages.

trial court granted summary judgment to Berkeley with respect to defense costs on the ground that the insurance company had breached its duty to defend and awarded Berkeley a small portion of defense costs claimed.

The court of appeals declined to "decide whether the improprieties noted by the arbitration panel and the conflict of interest found by the D.C. Bar Counsel constituted 'dishonest' conduct within the meaning of the exclusionary clause." (App. 12). Instead, it held as a matter of fact that Berkeley's conduct was a "deliberately wrongful" act within the meaning of the exclusion clause (Id.). It made this finding without giving Berkeley an opportunity to demonstrate that there was a genuine issue as to this fact which became material for the first time as a result of the appellate court's decision. The appellate court affirmed the finding that the duty to defend had been breached, but it refused to review de novo the trial court's summary limitations on the damages awarded and affirmed them as not clearly erroneous.

Berkeley petitioned for rehearing pointing out (1) the "deliberately wrongful" finding turned on his subjective intent and (ii) because Home had not sought summary judgment on that theory below, Berkeley had never had an opportunity to present evidence showing a genuine issue of fact on the intent issue. Berkeley expressly relied upon this Court's decision in *Fountain v. Filson*, 336 U.S. 681 (1949). Berkeley also asked the court to review the district court's summary judgment damage rulings de novo. The petition was denied. (App. 22).

REASONS FOR GRANTING THE WRIT

Ten years ago, in a trio of decisions[7] this Court encouraged the use of summary disposition to reduce the expense of litigation and the utilization of judicial resources where a trial is really not necessary. Unfortunately, this case provides a serious disincentive to the filing of summary judgment motions and thus acts to defeat the laudable goals of F.R.Civ.P. 56 and this Court's 1986 decisions.

In this case, Home, the defendant, moved to dismiss under Rule 12(b)(6) for failure to state a claim. Berkeley, the plaintiff, moved for summary judgment on liability. In response to the summary judgment motion, Home made no attempt to show the existence of genuine issues of material fact but relied on legal arguments. The district court decided this case based solely upon rulings of law, granting summary judgment on one major portion of the case (insurance coverage) and dismissing another major portion of the case (indemnification). Thus, since the issue of intent had not been raised as a factual issue in the district court, Berkeley did not introduce evidence on that issue.

On appeal, the court of appeals expressly did not rule on the correctness of the district court's crucial legal ruling relating to the dismissal. Rather, the appellate court affirmed on a totally different ground that made material for the first time the factual issue of Berkeley's intent. But the appellate court gave Berkeley no opportunity to show the existence of a genuine issue of material fact on this issue.

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[7] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Ind'l Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

In so doing, the appellate court ignored the procedural protections of Rule 56, and the holding of this Court in *Fountain v. Filson*, 336 U.S. 681 (1949), which the same court of appeals previously recognized that this Court admonished it for precisely this type of sua sponte summary judgment ruling. *Ramirez de Arellano v. Weinberger,* 745 F.2d 1500, 1538 (D.C.Cir. en banc 1984). When the disregard of the Rule 56 protections, even after admonishment. is added to the court of appeals' review of the grant of summary judgment on the amount and nature of the allowed defense costs under the "clearly erroneous" standard, that court has sent the message that moving for summary judgment is a dangerous enterprise, to be avoided if at all possible.

The holding of the court below, in addition to ignoring the clear dictate of Rule 56 and *Fountain* and its application of the "clearly erroneous" standard to legal rulings on summary judgment, can only work to defeat the salutary purpose of this Court's 1986 rulings. It is this aspect of the decision below, as well as the court of appeals' deliberate disregard of this Court's *Fountain v. Filson* admonition, that renders this case important and warrants the grant of certiorari.

I. The court below, in reviewing a ruling granting a F.R.Civ. P. 12 (b)(6) motion to dismiss for failure to state a claim, which perforce was a ruling as a matter of law, violated the protections against arbitrary grants of summary judgment when it altered the theory on which dismissal was based, made material for the first time an essential fact, and then decided that factual issue without first providing the plaintiff an opportunity to demonstrate that it is genuinely at issue.

Rule 56 of the Federal Rules of Civil Procedure authorizes district courts to decide cases using summary procedures in cases where there are no material facts in dispute only after first having given the party against whom judgment is requested an opportunity to demonstrate that there is a genuine issue of material fact.[8] An appellate court, likewise can grant judgment for one party on a theory not considered by the trial court but only upon a finding that the party against whom summary judgment is entered has had the opportunity of showing that there is a genuine issue concerning any fact that for the first time has become material. *Fountain v. Filson*, 336 U.S. 681, 682-83 (1949); *USA Petroleum Co. v. Atlantic Richfield Co.*, 13 F.d. 1276, 1280, n.2 (9th Cir. 1994).

In this case, the district court granted a motion to dismiss Berkeley's claim for indemnity for the judgment

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[8] This is true whether the court is considering summary judgment on motion of the opposing party or upon its own motion. F.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) ("district courts are widely acknowledged to possess the power to enter summary judgment sua sponte, so long as the losing party was on notice that she had come forward with all of her evidence.").

against him. (App.28). On appeal of this ruling, the court of appeals exceeded its authority by making independent, first instance findings of fact on issues related to Berkeley's intent in doing certain acts without first having given Berkeley an opportunity to show that there was a genuine issue on these material facts.

This Court has stressed the importance and utility of the summary disposition techniques authorized by Rules 12 and 56 of the Federal Rules of Civil Procedure and encouraged lower courts to use summary disposition techniques in appropriate cases. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242 (1986). While these techniques have helped to alleviate the burden of unnecessary trials, this Court has emphasized that this salutary result can be obtained only under the proper safeguards provided by Rule 56 and due process. This case is indicative of a tendency that has developed in the lower courts to depart from the accepted and usual course of judicial proceedings in considering such motions,[9] and, therefore, the exercise by this Court of its supervisory powers over the federal judiciary is warranted.

The essential facts of this case are undisputed. First, Berkeley had an insurance policy which was held by both courts below to be applicable to this dispute. Second, Berkeley sued Home to recover under the policy both his

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[9] See, McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. Rev. 203 (1933); *Shagar v. Upjohn Co.*, 913 F.2d 398, 403 (7th Cir. 1990); *Canita v. Yellow Freight Sys.*, 903 F.2d 1064, 1068 (6th Cir. 1990); *EEOC v. Luckmarr Plastics, Inc.*, 884 F.2d 579 (6th Cir. 1989); *Healy v. New York Life Ins. Co.*, 860 F.2d 1209, 1219 (3rd. Cir. 1988).

cost of defending himself and the amount he lost because of the judgment against him. Third, Home moved to dismiss solely on the ground that AEPCO's claim against Berkeley was for a return of fees.

Fourth, Berkeley moved for partial summary judgment on liability. Fifth, it was only in its opposition to Berkeley's motion that Home raised the issue of the applicability of the policy's exclusionary clause. At that time it argued only that as a matter of law it precluded summary judgment for Berkeley. Sixth, under applicable District of Columbia law, Home had the burden of proving the applicability of any exclusion to the award against the insured. It did not introduce any such evidence; nor did it argue that there was any genuine issue of material fact that should send this matter to trial.[10]

Seventh, the court of appeals affirmed the lower court on a theory different than that relied on by the lower court; that new theory depended on a finding that Berkeley knew his conduct was violative of the Rules of Professional Conduct, but in so ruling it did not give Berkeley the opportunity to demonstrate that there was a genuine issue of fact that became material only after the court of appeals' shift of theory. And eighth, as soon as this shift of theory appeared in the appellate opinion, Berkeley, relying on this Court's decision in

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[10]In a Supplemental Memorandum in Opposition to Summary Judgment filed after argument on the motions to dismiss and for summary judgment, Home urged that it needed discovery as permitted by F.R.Civ.P. 56(f) to show, inter alia, that Berkeley's conduct had been "deliberately wrongful." (D.E. 27, p. 57, n. 16). The district court held that the request for discovery came too late. The appellate court affirmed that ruling as within the district court's discretion.(App. 7-11).

Fountain v. Filson, 336 U.S. 681 (1949), petitioned the court below to remand so that he would have the opportunity of showing that his conduct, assuming that it was wrongful, was neither knowingly nor deliberately so within the meaning of the policy.

This Court has established a number of principles regarding the application of Rule 56. In *Associated Press v. U.S.,* 326 U.S. 1 (1945), this Court stated, at 6 that:

> Rule 56 should be cautiously invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of facts between them.

In *U.S. v. Diebold*, 369 U.S. 654, 655 (1962), this Court held that even when the facts are clearly established, if the findings required to arrive at a judgment represent a choice of inferences to be drawn from the subsidiary facts contained in affidavits and other supporting documents, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion.

In this case, Home filed a motion to dismiss. In that motion, the sole issue was whether the complaint, as a matter of law, stated no claim upon which relief could be granted, i.e., that Berkeley could present no facts within the claim stated that would entitle him to judgment. Home contended in particular that the relief requested by and granted to AEPCO was a return of fees which was excluded from coverage. In opposition to that motion Berkeley needed to meet only that argument. And in meeting that argument, he had no occasion to urge that there was a genuine issue of material fact as to whether he had deliberately engaged in wrongdoing.

The only other substantive motion before the district court was Berkeley's motion for partial summary judgment as to liability. Manifestly, he had no occasion to argue in support of that motion that there was a genuine issue of material fact or to present affidavits or other documents to support an argument that there was a genuine issue of fact as to whether he had committed a deliberately wrongful act.[11] And the district court had no occasion to and did not arrive at any finding or conclusion concerning that fact.

The district court denied the motion to dismiss with respect to coverage but granted it as to indemnity. It ruled that, as a matter of law, whenever a lawyer commits an "impropriety" the lawyer has committed "a dishonest" act within the meaning of the policy's exclusionary clause. (App. 11, 27).

The court of appeals did not affirm the district court's legal finding that Berkeley's conduct was within the scope of the "dishonest acts" exclusion as a matter of law. Instead, on its own motion and without affording Berkeley an opportunity to demonstrate that a genuine issue of material fact existed, the court of appeals evaluated the scant material in the record, which did not address in any way Berkeley's intent, and concluded based on that evaluation that his conduct was deliberate and therefore subject to the exclusion on that

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[11] However, as noted in footnote 10, supra, p. 12, at the eleventh hour in an effort to blunt the force of Berkeley's motion for summary judgment, Home requested time for discovery in order to demonstrate the existence of a genuine issue of fact on the issue of intent. It is indeed odd that the court of appeals would find evidence sufficient to support a finding of intent in a set of facts when Home did not even think that evidence raised a genuine issue of material fact on that issue sufficient to withstand Berkeley's motion for summary judgment.

ground. (App.11-16). In essence without notice or opportunity to submit evidence, the court of appeals granted a summary judgment against Berkeley in a situation in which one had not been requested and without affording him the opportunity to demonstrate that a genuine issue of material fact existed.

While an appellate court may affirm a summary disposition on a new theory, it must do so "with great circumspection." *Stella v. Tewksbury*, 4 F.d. 53, 55 (1st Cir. 1993); *Hoffa v. Fitzsimmons*, 673 F.2d 1345, 1361 (D.C. Cir. 1982) (a new theory "rarely" should be adopted on appeal). Before adopting a new theory, the appellate court must be certain the factual record is complete and the loser is not deprived of any "opportunity to remedy" that would have been available in the trial court. *Fountain v. Filson,* 336 U.S. 681, 682-83 (1949).[12] In *Fountain*, this Court stated, at 683:

> Summary judgment may be given, under Rule 56, only if there is no dispute as to any material fact. There was no occasion in the trial court for Mrs. Fountain to dispute the facts material to a claim that a personal obligation existed, since the only claim considered by that court on her motion for summary judgment was the claim that there was a resulting trust. When the Court of Appeals concluded that the trial court should have considered a claim for personal judgment it was error for it to deprive Mrs. Fountain

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[12] See also, *Iacurci v. Lummus Co.*,387 U.S. 86 (1967); *Stinson v. Atlantic Cost Line R. Co.*,355 U.S. 62 (1957); *Weade v. Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801 (1949).

> of an opportunity to dispute the facts material to that claim by ordering summary judgment against her.

As this Court made clear in *Fountain*, the *Fountain* ruling on the power of appellate courts to grant summary judgment for a party when neither a motion was made nor the trial court had given notice of a possible sua sponte action follows the principle enunciated in *Globe Liquor Co. v. San Roman,* 332 U.S. 571 (1948), and *Cone v. West Virginia Paper Co.,* 330 U.S. 212 (1947). That principal prohibits an appellate court from entering JNOV in favor of a party who had not moved for JNOV in the trial court: "otherwise the party who had won in the trial court would be deprived of any opportunity to remedy the defect which the appellate court discovered." This Court made clear in *Fountain* that "the same principle interdicts, *a fortiori,* the appellate court order for summary judgment here." 366 U.S. at 681.[13]

Further, "appellate courts must constantly have in mind that their function is not to decide factual issues de

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[13] Similarly, in *Byrd v. Blue Ridge Elec. Corp., 336 U.S. 525 (1958),* where the appellate court reversed a jury verdict on a factual issue on which the plaintiff had not had an opportunity to present evidence at trial, this Court remarked, at 533:

> The petitioner was fully justified in that circumstance in not coming forward with proof of his own at that stage of the proceeding, for he had nothing to meet under the District Court's view of the statute. He thus cannot be penalized by the denial of his day in court to try the issue under the correct interpretation of the statute.

In *Ramirez de Arellano v. Weinberger,* 745 F.2d 1500, 1538 (D.C. Cir. 1984), the District of Columbia Circuit, *en banc*, observed that in *Fountain* this Court set a very high standard for a *sua sponte* grant of summary judgment by an appellate court and noted that in *Fountain* this Court had "admonished" the District of Columbia Circuit when it "attempted to raise and resolve an entirely new issue by summary judgment on appeal."

novo." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985), quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).

In this case, Home moved to dismiss pursuant to Rule 12(b)(6); it did not seek summary judgment. A Rule 12(b)(6) motion contends that the allegations of the complaint facially establish that the plaintiff cannot prevail on any set of facts. *See, Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The trial court, noting that the arbitrators' decision found that Mr. Berkeley's conduct was "below the level of propriety" expected of a senior member of the bar, held, as a matter of law, that "[i]mpropriety of a lawyer is or should be recognized as 'dishonesty'" within the meaning of the policy exclusion.(App. 27)[14] In so ruling, the trial court relied solely upon the complaint and the exhibits incorporated therein, and made explicit in its Order (App. 28) that it was granting a "Motion to Dismiss" and not a summary judgment motion.

Berkeley could not have defeated Home's Rule 12(b)(6) motion or prevailed on his own summary judgment motion by showing a genuine factual dispute as to whether his actions were deliberately wrongful.[15] Thus, he did not offer such evidence. If Home had sought summary judgment, or

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[14] The district court also stated that the arbitrators relied "particularly on the conflict of interest." (App. 27). This is error. The arbitrators' ruling does not give primacy to any of the three grounds and explicitly states that those factors "when considered together" support the award against Berkeley. (App. 28).

[15] The court of appeals disregarded Berkeley's proffer to the contrary and assumed such knowledge to reach its conclusion that "[s]o blatant a violation can only be deliberate." (App. 14).

if the trial court had contemplated entering summary judgment against Berkeley sua sponte, Rule 56(c) would have guaranteed Berkeley a minimum of 10 days to show, at the least, that there was a genuine issue of material fact. The court of appeals deprived Berkeley of this opportunity.

After the appellate decision, Berkeley petitioned for rehearing, raising the issue that the court of appeals decision deprived him of his rights under Rule 56(c). In order to demonstrate that this was not a mere academic issue, Berkeley proffered that, upon remand, he could show the following:

* Berkeley understood the "substantial relationship" test of Rule 1.9 to focus on restricting "side-switching." *Brown v. District of Columbia Bd. of Zoning Adj.*, 486 A.2d 37, 42-43 (D.C. 1984). He believed that where a lawyer sought only to continue an existing representation, which is what occurred here, the rule would be read narrowly.[16]

* Berkeley believed that "side-switching" involved advocating inconsistent positions on "identical" or "nearly identical" issues. *Government of India v. Cook Indus, Inc.*, 596 F.2d 737, 739 (2d Cir. 1978). He understood the relevant "issue" to be the meaning of the contractual provision specifying the respective rights of Willcox and AEPCO. He did not believe his general familiarity with AEPCO was controlling.[17]

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[16] The court of appeals states that "Berkeley was hired by [Willcox] after being fired by AEPCO." (App. 12). In fact, Willcox and AEPCO had been his joint clients for 20 years, and he simply continued the representation of Willcox.

[17] For example, the knowledge developed by representing a broker in ten securities cases over a decade was not "substantially related" to a securities action against the same broker. *Duncan v. Merrill, Lynch, P. F. & S.*,

* His factual recollection at the time was that his firm had never advised either AEPCO or Willcox concerning that contract provision and, indeed, had been excluded from the contract negotiations between AEPCO and Willcox. Only later did he discover that a lengthy memorandum written three years earlier devoted a few sentences to that clause.

* Most importantly, he understood the "substantial relationship" test to apply only where "confidential information" received from a prior client would bear on the issues to be addressed for the new client. *Brown*, supra, 486 A.2d at 49 (defining "methodology" for identifying substantial relationship). Since AEPCO never intended for information supplied in the context of the joint representation to be confidential from Willcox, Berkeley believed the substantial relationship test could not be satisfied.[18] *See, Allegaet v. Perot*, 596 F.2d 246, 250-51 (2d Cir. 1977) (where former client knew that information would be shared with client, substantial relationship test is "inapposite"); *Christensen v. United States District Court*, 844 F.2d 694 (9th Cir. 1988) (same).

Berkeley erred. Perhaps his judgment was colored by his conviction that AEPCO was abusing the trust of Willcox or impaired by his ill-health at the time. (He was experiencing serious heart problems and had just had a triple angioplasty.) In any event, Home agreed to insure such errors so long as they were not deliberately wrongful. We

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Inc., 646 F.2d 1020 (5th Cir. 1981).

[18] Bar Counsel stated that Berkeley 's view on the issue of confidentiality was correct. (App. 50)

respectfully submit that the evidence proffered above is sufficient to require a remand to the district court.

Fundamental fairness, due process, and the settled practice of this Court, *see, Howlett v. Birkdale Shipping Co.*, 512 U.S.___, 114 S.Ct. 2057 (1994); *Sartor v. Arkansas Natural Gas Corp.* 321 U.S. 620 (1944); *Masson v. New Yorker Magazine*, 501 U.S. 496, (1991), *Fountain v. Filson, supra,* entitle Berkeley to an opportunity to show that there is a genuine fact issue to be determined and, upon that showing, to have his credibility and subjective state of mind assessed by a finder of fact on a full record and not to have his good name sullied without even an opportunity to show that there is a genuine issue as to that material fact.[19]

In concluding that Berkeley's conduct was deliberately wrongful, the court of appeals stressed (App. 14) that Bar Counsel's "imposition of a sanction necessarily implied that Berkeley's violation of Rule of Professional Conduct 1.9 was knowing and intentional."[20] However, the language of Rule 1.9 establishes an objective standard, making no reference to scienter. *Cf. In re James*, 452 A.2d 163, 167 (D.C. 1982) (related predecessor provision does not require scienter). Indeed, substantial sanctions may be imposed for violations occurring with an "innocent state of mind." *In re Dorsey*

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[19] As was pointed out in footnotes 10 and 11, supra, even Home had urged the district court that there was a need to develop the facts on whether Berkeley's alleged wrongdoing was "deliberate."

[20] The court of appeals cited *In re James*, 452 A.2d 163, 166 (D.C. 1982), *cert. denied*, 460 U.S. 1038 (1983). Presumably this case was cited for the proposition that the Court of Appeals was bound by Bar Counsel's finding of dishonest conduct unless it is unsupported by record evidence before Bar Counsel. The problem here is that Bar Counsel made no finding of dishonesty or intentional wrongdoing. (App.45-50).

Evans, 578 A.2d 1141, 1150 (D.C. 1980) (six-month suspension). Petitioner has found no authority suggesting that imposition of an informal admonition under Rule 1.9 requires a knowing or intentional violation, and there is none. If anything, the imposition of the mildest possible sanction under a rule that imposes no scienter requirement, coupled with the absence of any finding of intent, implies a low degree of culpability negating any inference of deliberate wrongdoing.[21]

The factual errors of the court of appeals are referenced here not to suggest that this Court should grant certiorari to correct them. Rather, these errors are referenced to illustrate the anger of appellate courts changing the theory of law on which a case is decided, thereby making material a new factual issue, and then not remanding for consideration of whether there is any genuine dispute as to that fact. These errors also point out the danger of not following the requirements of Rule 56(c) and the wisdom of this Court's decision in *Fountain v. Filson*, 336 U.S. 681 (1949), requiring appellate courts in the circumstances of this case to remand to permit a party the opportunity of demonstrating the existence of a genuine issue on the newly material fact.

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[21] In its eagerness to resolve this case, the court of appeals came to a conclusion on the issue of intent without a trial ever having been held and indeed without giving Berkeley the opportunity to demonstrate that there was a genuine issue as to intent. This is contrary to this Court's consistent position that summary judgment is not appropriate "where motive and intent play leading roles," *White Motor Co. v. U.S.*, 372 U.S. 253, 259 (1963), quoting *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962), at least without giving the losing party the opportunity to demonstrate the existence of a genuine factual issue.

It is the failure of the court below to follow the dictates of *Fountain v. Filson* in the context of the enhanced understanding of the importance of summary disposition, and hence the increased numbers of such dispositions,[22] since this Court's 1986 trilogy of cases that makes this case important and worthy of this Court's attention. Summary judgment is an important vehicle of efficient justice and judicial administration. But it must be utilized within the safeguards established by Rule 56(c) as well as by due process. In light of ten years experience since the 1986 trilogy of summary judgment cases, it is now appropriate for this Court to reiterate the safeguards laid down in *Fountain*. We respectfully urge that this case, in which *Fountain* was so flagrantly disregarded by a court that by its own admission was previously admonished by this Court on this very issue,[23] is an appropriate vehicle for such consideration.

II. The court below, in reviewing holdings on certain elements of damage before the district court on a motion for summary judgment, violated settled principles when it applied the "clear error" standard utilized for review of findings of fact after a trial, rather than the "de novo" standard applicable to review of holdings on issues of law and grants of summary judgment.

The accepted standard of review of a trial court's grant of a motion for summary judgment or to dismiss is de novo review. *Salve Regina College v. Russell*, 499 U.S. 225

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[22] See Cecil, *Trends in Summary Judgment Practice: A Summary of Findings*, FJC Directions (1991) (setting forth the increased number of summary judgment dispositions, but also pointing out that the increased trend started at least in 1975).

[23] See fn 13, p. 16, *supra*.

(1991); *U.S. v. Mississippi Valley Generating Co.*, 346 U.S. 520, 526 (1961); Moore's *Federal Practice, ¶52.03[2], p.52-77 (1992)*. In this case, the district court rejected, without a trial, certain of Berkeley's claims regarding incurred defense costs that Berkeley claimed Home should have reimbursed. Consequently, there was no opportunity to develop a full factual record and the rulings were made as a matter of law. In reviewing these rulings, however, the court of appeals repeatedly deferred to the trial court's summary rejection of Mr. Berkeley's claimed damages, finding "no clear error."

Because this case arises from rulings on motions to dismiss and for summary judgment - on which the parties before the trial court argued solely on the basis of law and no conflicting evidence was presented - the court of appeals was required to "apply[] the same standard as the district court" deciding each issue de novo and, where the court found that "material facts are subject to divergent inferences," to refuse to resolve the conflict and remand for determination of the factual issue in normal course. *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. 1994); *U.S. v. Diebold*, 369 U.S. 654 (1962). Thus, unless the court of appeals independently concluded that the trial court's damage ruling was compelled as a matter of law settled authority required a remand for trial.

The significant error of the court below was to review district court conclusions of law on summary judgment not de novo but for "clear error" of fact. Once again, operating without a complete record, the court below made clear factual errors on which it then relied in assessing the trial court's legal rulings on a standard applicable to findings of fact after a complete record had been made. These errors illustrate the danger and cost of an appellate court

abandoning this Court's settled standard of review in order to achieve a quick resolution of a dispute in which a full record has not yet been developed. Thus, this case is an appropriate vehicle for this Court to clarify an area of law that is even more significant in the post-*Celotex* era.

An examination of what the court of appeals did here is illustrative. First, it ruled (App. 21, n.14) that the trial court's denial of the legal fees incurred by Berkeley to establish Home's breach of its duty to defend[24] was not clear error because "Home had reason to believe that Berkeley's conduct fell within the exclusionary clause" of the policy. In fact, Home never claimed that Berkeley's conduct justified its refusal to defend. Nor would such a claim have been even remotely tenable since the policy expressly required Home to defend (as opposed to indemnify) even against claims arising out of "dishonest, fraudulent,[or] deliberately wrongful acts." (footnote 6, supra). Instead, as the Court of Appeals elsewhere stated (App. 4):

> Home refused to provide a defense, *contending that the only relief [sought by the counterclaim] was the return of legal fees*, which was excluded from coverage under the policy. [emphasis added]

Home's actual claim that the counterclaim sought only a return of fees was rejected by both the trial and appellate courts. Rather than deferring to the trial court on the basis of a factual error, the court of appeals should have

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[24] Generally accepted insurance law provides for the payment of an insured's legal fees when the insured sues to recover the costs of defending himself after the insurance company has refused coverage without justification. *See,* Appelman, *Insurance Law and Practice*, (Bernal ed.), §4691.

reversed on the ground of an error of law. Alternatively, if the court of appeals had concluded that the issue needed to be decided as a matter of fact, it should have remanded for the development of a full record on this issue.

Second, the court below (App. 18) also found no "clear error" in the denial of recovery for the incentive fees paid to Steptoe in the arbitration because the "fee agreement was not materially altered after the counterclaim was filed; the contingent fee was tied to Berkeley's affirmative case." Not so. Lead counsel from Steptoe provided an uncontradicted affidavit (D.E. 50, Exh.4, ¶5) that:

> After the Home declined to pay Berkeley's representation regarding the counterclaim, Steptoe & Johnson and Berkeley agreed that the firm would defend him against the counterclaims under the terms of the initial agreement, including the reduced hourly cap and incentive fee provision. *However, the original fee cap was raised from $500,000 to 575,000.* [emphasis added]

To compensate Steptoe for its reduced hourly rate, Steptoe was to receive an incentive fee of 3% of the recovery above $2 million for each $100,000 of hourly fees charged. (D.E. 50, Exh.3, p.3) Thus, the $75,000 increase in the hourly cap (itself a material change) exposed Berkeley to an additional $22,500 of incentive fees for each $1 million of recovery. As the total recovery on which the incentive fee was figured was $9,669,115, the total additional incentive fee resulting from the $75,000 fee cap increase was $172,555. Therefore, the

total minimum increase in Steptoe's fees was $247,555 (i.e. $75,000 + $172,555 = $247,555).[25]

In the face of these undisputed facts, the trial court decided as a matter of law that the incentive fee paid to Steptoe was not materially changed. Rather than agree, or disagree as a matter of law, the appellate court applied a "clear error" standard applicable to factual findings after the development of a full record. This was error and illustrates the danger in applying the standard of review applicable to factual findings where a full record has not been made.

Third, the court of appeals also failed to make a de novo ruling on Berkeley's preferred position - presented and argued to the trial court and decided by the trial court as a matter of law - that Home's duty to "defend any claim" required it to pay all legal and expert fees incurred to defend the counterclaim, even if those fees also contributed to Berkeley's affirmative case. Instead of deciding de novo whether the trial court was right or wrong as a matter of law or that the issue could not be decided on that basis and therefore required a remand for the development of a full record, the court of appeals merely held that the trial court's denial of those fees was not "clear error." (App 18).

The question presented was not whether expenses may be apportioned between parts of a case that an insurer is obligated to defend and parts it need not defend. Instead, the

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[25] Looked at another way, it is undisputed that Steptoe charged the full $575,000 in hourly fees and that the trial court ruled that $153,385.15 of that amount (about 26%) was attributable solely to the counterclaim (App.34). Thus, Berkeley incurred at least $353,220 of additional incentive fees defending the counterclaim. (Twenty-six percent of the total incentive fee of $1,322,922 is $353,220.)

issue was how to apportion expenses that serve a dual role, advancing a covered defense while also advancing other interests of the insured. The district court excused Home from any expenses that Berkeley would have incurred to advance his affirmative case, even if those expenses also directly serve to defend against the counterclaim, thereby fulfilling Home's duty to defend. This is exactly backwards. In the law of insurance:

> the [insured] is entitled to the full benefit of its bargain. So long as an item...is reasonably related to the defense of a covered claim, it may be apportioned wholly to the covered claim.

Continental Casualty v. Board of Education, 489 A. 2d 536, 545 (Md. 1985).[26]

Home contracted to "defend any claim against the insured including the appeal thereof seeking damages to which this insurance applies" (D.E. 1, Exh. A, p.3), as well as "any...claims" arising out of "any dishonest...or deliberately wrong acts." (Id. p.18). As the court below held, the filing of the counterclaim triggered this contractual duty.

Of course, it is not the province of this Court to decide matters of local insurance law. The significant point is that, when presented with legal arguments as to whether the trial court was right or wrong on its construction and application of local law to a matter before it on motions to dismiss and for summary judgment, the appellate court failed

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[26] To the same point, *Raychem Corp. v. Federal Ins. Co.*, 853 F. Supp. 1170, 1182 (N.D.Cal. 1994); *Nordstrom, Inc. v. Chubb & Son, Inc.*, F. Supp. 530, 536-37(W.D.Wash. 1992).

to apply the correct standard of review. Rather than decide the matter de novo as a matter of law, the appellate court applied the clear error standard applicable to findings of fact after the development of a full record which had not occurred here. In doing so, the appellate court abandoned the standard of review clearly set forth by this Court and conducted a factual review when no opportunity for the development of a full factual record had occurred. *Salve Regina College v. Russell*, 499 U.S. 225 (1991); *U.S. v. Mississippi Valley Generating Co.*, 346 U.S. 520 (1961).

In this post-*Celotex* era, in which trial courts are justifiably deciding more cases in a summary fashion, the standard of review of such decisions is extremely important. Reviewing a decision of law made on summary procedures under a standard applicable to findings of fact made after the opportunity to make a full record turns review on its head and renders summary disposition even more dangerous because of the denial of effective review. This case is an appropriate vehicle for this Court to make clear, in this post-*Celotex* world, the standard of review that is appropriate for summary dispositions.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully Submitted,

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